IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:26.11.2007

CORAM;

THE HONOURABLE MR.JUSTICE P.K.MISRA

AND

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN

W.P.No.15853 of 2007

and

M.P.No.1 of 2007

1.L.Thamayanthi
No.4, Fathima Manzil Street
Pallavaram
Chennai 600 043

2.A.L.Nail Industries

3.A.Loganathan

4.L.Sundaramurthy

5.L.Gnanamurthy

6.L.Sekhar

7.L.Deivasigamani
2 to 7 at
No.98, Bazaar Road
Pallavaram
Chennai 600 043 ..Petitioners

vs

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1.The Catholic Syrian Bank Ltd.,
Pallavaram
Chennai 600 043

2.The Hon'ble Presiding Officer
The Debt Recovery Tribunal-1
Spencer Towers, 6th Floor
770-A, Anna Salai
Chennai 600 002

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3.The Hon'ble Presiding Officer
The Debt Recovery Appellate Tribunal
Chennai ..Respondents

Writ Petition is filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus calling for records of the 3rd respondent and quash the order passed by the 3rd respondent dated 20.03.2007 in M.A.No.2/2007 confirming the order of the 2nd respondent dated 25.10.2006 in M.A.No.24/2002 and consequently set aside the order of the 2nd respondent dated 28.12.2001 passed in M.A.No.24/2002.

for petitioner : Mr.T.V.Ramanujam
Senior Counsel
Ms.M.Christella

for respondents : Mr.V.Bhiman
for
M/s Sampath Kumar Associates
(for R1)

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ORDER

(Order of the Court was made by P.K.MISRA,J.)

Heard the learned counsel appearing for the parties.

2.The present respondent No.1 had filed O.A.No.663 of 1999 before the Debts Recovery Tribunal for recovery of Rs.20,29,650.72 together with future interest. In the said O.A., the present petitioners, who were the defendants 1 to 7, had filed written statement. Among other things, the defendants had contended that the Bank was not justified in claiming penal interest. It was further indicated that they were ready and willing to settle the entire amount in installments provided the Bank waived the penal interest and the interest charged after the closure of the business. The said O.A. was posted for hearing on 24.10.2001. Since the defendants and their counsel were absent, the defendants were set ex parte. On 24.10.2001, the following order was passed:

> "Shri Kasturirangan counsel for the a/bank and none for the defendants. Applicant witness Shri. V.Ganesan is present. None for the defendants nor their counsel is present when the matter is called at 12.50 p.m. A perusal of the previous order sheet shows that the defs. remained

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absent even though a specific direction was passed by this court for their appearance in this court. The defs. are called absent and set as exparte. Their opportunity for C.E. is closed. The present applicant witness is discharged. Heard the counsel for the a/bank in respect of final arguments. Hearing stands concluded. The case is reserved for passing final orders on 22.11.2001."

3.Thereafter on 22.11.2001, the Debts Recovery Tribunal again posted the matter on 26.12.2001 for passing final order and similarly, the matter was reposted to 28.12.2001, as the Judge was absent. Ultimately, on 28.12.2001, final order was passed in O.A., allowing such application of Bank, directing recovery of amount claimed along with pendent lite and future interest at the rate of 15% simple interest per annum. Subsequently, the present petitioners filed an application for setting aside the ex parte final order, which was numbered as miscellaneous application No.24 of 2002. In such application, it was stated that the Advocate on record for the defendants had left for his native place by requesting another Advocate to seek for adjournment on 24.12.2001, but unfortunately, such Advocate, who was asked to request for adjournment, did not appear and thereafter,an ex parte final order was passed. The Debts Recovery Tribunal vide order dated 25.10.2006, rejected such application for restoration. Thereafter, the petitioners' appeal before the appellate Tribunal numbered as M.A.No.2 of 2007, which has been dismissed under the impugned order, dated 20.03.2007 is under challenge in the present writ petition.

4.The appellate Tribunal has found fault with the petitioners by observing that the petitioners could have approached the Debts Recovery Tribunal even before final order was pronounced on 28.12.2001.

5.In *AIR 1955 SC 425 (SANGRAM SINGH V. ELECTION TRIBUNAL)*, while considering the scope of the provisions contained in Order 9 CPC., the Supreme Court had analysed the various facets of ex parte hearing. Subsequently, such decision was followed by the Supreme Court in *AIR 1964 SC 993 (ARJUN SINGH v. MOHINDRA KUMAR AND OTHERS)*. On a conjoint reading of the aforesaid decisions of the Supreme Court, it is apparent that, if on a date fixed for hearing the defendant does not appear, the Court may pass an ex-parte decree which can be set aside if the defendant shows sufficient cause for non-appearance on the date of which the hearing of the suit was completed. If, however hearing of the suit is adjourned to a future date, the defendant,

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> "... cannot be stopped from participating in the proceedings simply because he did not appear on the first or some other hearing. But though he has the right to appear at an adjourned hearing, he has no right to set back the hands of the clock. Order IX Rule 7 makes that clear. Therefore, unless he can show good cause, he must accept all that has gone before and be content to proceed from the stage at which he comes in."

6.From a reading of the aforesaid decision, it is also clear that there is no hiatus between the stage when the case is concluded and the stage when the ex parte judgment is finally pronounced.

7.In the present case, it is apparent that the case had been posted on 24.10.2001 for hearing i.e., for recording evidence. On the said date, even if the witness was present on behalf of the Bank, such witness was discharged by the Tribunal and the Tribunal only heard the arguments of the counsel appearing for the Bank and reserved the matter for pronouncement of the final order on a future date. By applying the ratio of the two aforesaid Supreme Court decisions, it is apparent that there was no scope for filing any application for setting aside the order dated 24.10.2001 at that stage because "hearing of the argument" was completed and the matter was posted for pronouncement of the final order. It is apparent that the Debts Recovery Tribunal as well as Debts Recovery Appellate Tribunal have misdirected themselves by ignoring the aforesaid basic principle highlighted by the Supreme Court in the two decisions noticed above. It is to be noticed that main defence of the defendant (present petitioner) was relating to levy of penal rate of interest. The Debts Recovery Tribunal had not considered the said aspect in its ex parte order. Merely on the basis of oral submissions made by the counsel appearing for the Bank, the claim of the Bank has been allowed.

8.Having regard to the facts and circumstances of the case and particularly, keeping in view the fact that the appellate Tribunal has proceeded with the matter by applying a wrong principle, we feel interest of justice should be served by setting aside the ex parte judgment and directing that the matter should be disposed of afresh on merits. Accordingly, the writ petition is disposed of subject to the following directions:

> "Ex parte final order of the Debts Recovery Tribunal is set aside subject to the condition that a sum of Rs.5,00,000/- (Rupees five lakhs only) shall be deposited by the present petitioners on or before 31.01.2008 to the

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credit of O.A.No.663 of 1999 before the Debts Recovery Tribunal-I, Chennai. If the aforesaid amount is not paid, the present order passed by us shall not be operative and the ex parte order of the Debts Recovery Tribunal shall be deemed to have been confirmed. On the other hand, if such amount is deposited, the Debts Recovery Tribunal shall proceed to dispose of O.A.No.663 of 1999 on merits by giving opportunity of hearing to defendants. Such proceedings should be disposed of as expeditiously as possible, preferably within a period of six months thereafter."

No costs. Consequently, the connected MP is closed.

sal/vvk

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

To

1.The Presiding Officer
The Debt Recovery Tribunal-1,
Spencer Towers, 6th Floor,
770-A, Anna Salai,
Chennai 600 002.

2.The Presiding Officer,
The Debt Recovery Appellate Tribunal,
Chennai.

1 cc to Mr.M.Christella, Advocate, SR.70026

ntk (co)

dv/8.1.

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